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No. 97-920

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

THE PEOPLE OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

MARIAFELISSA SMITH, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION TWO

APPENDIX

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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIAFELISSA SMITH, Defendant and Appellant	A072044 (Contra Costa County Super. Ct. No. 9509894)

Mariafelissa Smith appeals from a conviction of second degree murder of her newborn child. She contends the conviction must be reversed because it was based upon statements to the police obtained in violation of her rights under *Miranda* v. *Arizona* (1966) 384 U.S. 436; the jury was not instructed to determine whether the baby died from methamphetamine poisoning or from drowning; the jury was not instructed on the lesser included offense of misdemeanor manslaughter based on methamphetamine use; and the jury was not instructed that it had to agree unanimously on the act or omission that caused the baby's death.

STATEMENT OF THE CASE

Appellant was charged by indictment filed on June 8, 1995, with the murder of her baby on or about April 18, 1995. Jury trial began on September 11, 1995, and appellant was found guilty of second degree murder on September 21. On October 20, appellant [2] was sentenced to a prison term of 15 years to life. She filed a timely notice of appeal on October 24, 1995.

STATEMENT OF FACTS

At the time of trial, appellant and her husband, Duane Smith, had been married for seven and a half years were raising two children, age six years and four years, and had given a third child up for adoption. Appellant had also had two abortions and one miscarriage.

On October 21, 1994, appellant told her doctor, who had diagnosed her with "adjustment disorder" or "mild depression," that she had had a positive home pregnancy test and wanted to terminate the pregnancy. When informed that her medical insurance would not cover the cost of an abortion unless she was in medical danger, appellant said she would find a "way to terminate even if it meant putting herself in danger." On October 26, appellant was referred to Planned Parenthood.

Flordeliza Bartolo, appellant's 16-year-old sister, testified that in the fall of 1994 appellant had asked for a ride to Oakland to get an abortion; she had agreed to take appellant but had not in fact done so. Appellant had said she did not want to have another baby with her husband; she told her sister she was depressed and was having marital problems.

Smith testified that appellant became pregnant in the fall of 1994, but when she had her menstrual period in November and December of that year, he and appellant assumed the pregnancy test had been a false positive or appellant had had a miscarriage.

On April 12, 1995, Dr. Anh Bui examined appellant at the Antioch Kaiser-Permanente. Appellant was experiencing pelvic pressure and had noticed enlargement of her abdomen. She appeared to the doctor to be about seven or eight months pregnant, although she could also have had fibroids in her uterus. When Bui discovered a fetal heartbeat, appellant expressed disbelief, saying she could not be pregnant because she had been having periods; she was very upset and cried. Ultrasound

examination revealed the [3] fetus to be approximately 33 and a half weeks, give or take two to three weeks. Bui told appellant termination of a pregnancy after 24 weeks was illegal and asked her to consider giving the baby up for adoption. Although appellant said her period had ended the day before the examination, Bui did not find old blood as would be expected in this situation. Appellant had answered in the negative to a questionnaire query as to whether she had used drugs during pregnancy; Bui testified that use of a large amount of methamphetamine can cause bleeding and premature labor as well as fetal death.

Two days later, Bui performed another ultrasound to assess the well-being of the fetus. Based on the results of this assessment, Bui testified the chance of a stillbirth the following week would be less than one in a thousand; the chances for survival of a fetus born at 33 and a half weeks would be more than 95 percent. Appellant indicated she was considering adoption. She was scheduled for another appointment on April 18.

Appellant's husband testified that although he had noticed in February 1995, that appellant was starting to put on weight, in April she was "not even close" to as big as she had been in previous pregnancies, looking to Smith at most four months pregnant and still wearing her regular clothes. When appellant visited Kaiser in April, Smith assumed she was about three months pregnant; she did not tell him the doctor informed her she was 33 weeks pregnant. Appellant's sister testified she thought appellant was getting fat because it "runs in our family." She did not think appellant was pregnant because she had given appellant sanitary pads to use during her periods.

During the afternoon on Easter Sunday, April 16, Smith noticed appellant walking in an unusual manner, "wobbling" and walking like a penguin. She went into the bathroom but said she was all right. Smith heard her turn on the water in the sink "once in a while;" when he

opened the door to the bathroom to hand her a cigarette she had asked for, he saw water all over the floor and a roll of toilet paper in the water. Smith fell asleep and when he woke up, appellant was lying with him. She said she was lightheaded and nauseated. The next day, appellant wore wrapped up toilet paper in her vaginal area [4] and looked a "little bit thinner, no stomach." Smith assumed appellant had had a miscarriage.

Appellant did not show up for her appointment at Kaiser on April 18. On April 19, nurse Donna Ball called appellant repeatedly and eventually reached her in the late afternoon. Appellant said she had a "problem" and would like to see Dr. Bui, then said she had lost the baby. Appellant said "Saturday night I was in the shower, and there was this big gush of blood, and the baby came out. And it was all blue and white." Appellant said she had not yet seen a doctor and could not come that afternoon, but agreed to come the next morning. Appellant sounded pleasant and cooperative.

After speaking with Ball, Dr. Francis Wright, the chief of obstetrics-gynecology at the Antioch Kaiser, called appellant. Appellant told him she had lost the baby the day before and had given him "a proper burial in the back yard." She told Wright she had freaked. Wright told appellant he would have to contact the police.

Pittsburg police officers Kohler, Calia and Beyhan arrived at appellant's apartment at about 4:50 p.m. on April 19; Detective Barbanica arrived about 5:23. Appellant, appearing nervous and shaken, said she had been expecting them and told them the baby was in a plastic garbage bag on the balcony. She said the baby had been born the previous night. Her young children were also in the apartment.

After the police found the baby, appellant was taken to the Pittsburg Police Department. Later that evening she was transported to the Walnut Creek Kaiser, where she was examined by Dr. James Ferry. Appellant told

Ferry her last menstrual period had been approximately one and a half weeks before and she had given birth on April 18. She said she had gotten into the shower to relieve low back pain and had delivered the baby, blue and not moving, followed after about two minutes by the placenta. Appellant told the emergency room nurse she spoke with on April 19 that she had delivered a stillborn baby the day before and put him in a plastic bag on her balcony. Appellant appeared to be very calm. The nurse testified that appellant came to the hospital in the company of a [5] uniformed police officer, who remained outside the door of the room in which she was examined. Analysis of appellant's blood drawn at Kaiser on April 19 showed .38 micrograms per milliliter of methamphetamine.

Detective Barbanica interviewed appellant at the police station for about an hour and a half, beginning around 12:30 a.m. on Thursday, April 20. Appellant had at this point been in the "care" of the police department for more than seven hours, having been taken by the police from her home to the police station, then to the Walnut Creek Kaiser, then back to the police station. Barbanica testified that he conducted the interview in "subdued" or "gentle" tones, like a "normal conversation." Appellant told Barbanica she had begun to suspect she was pregnant in February, but did not tell anyone, and learned she was in fact pregnant about a week before the interview. She said she had been told after the birth of her last son that she was physically incapable of having any more children and repeatedly said she did not want any more children.

Appellant initially told the detective she had delivered the baby, blue and white, in the shower on the Tuesday before the interview, then placed the baby and placenta into the garbage can. Appellant said she did not "'see herself'" picking up the baby and putting him in the garbage but realized after the fact that she had done so.

She told her husband she had had a miscarriage and flushed the baby down the toilet. The next morning, she moved the baby to the wastebasket in the children's bathroom so her husband would not find him, and then to the balcony.

Barbanica told appellant he did not believe she was being completely honest, said he knew she wanted to "'get this off [her] chest'" and asked her to start over from the beginning. Appellant told him the birth had occurred on Easter Sunday and the baby had been born while she was sitting on the toilet. She said as the baby went into the toilet she could hear a "gurgling sound as though it was gasping for its first breath of air." Appellant said the baby landed head first into the toilet, with his mouth and nose submerged under the water and feet sticking up. She closed the lid on the toilet, leaving **[6]** the baby inside, and took a shower. After taking her shower, appellant lifted the toilet lid and poked the baby's feet, but the baby did not move. Barbanica suggested that appellant might have actually put the baby into the toilet, but appellant insisted she gave birth into the toilet.

Appellant had told Barbanica she had hoped the baby was going to be born dead because she could not handle any more children physically, emotionally, or financially. She had considered adoption but "felt that the baby would be better off with God than with another family raising the child that she should be raising." She said that if she had learned of the pregnancy earlier, she would have terminated it, and that she was having menstrual cycles throughout the pregnancy. Appellant said that at one point she felt she should be calling 911 and realized, "'My God, what am I doing here?'" When asked if she ever thought, "'"I can't let the baby die. I've got to pick it up[,]"'" she said, "Honestly, no." Late in the interview, appellant was placed under arrest and started to cry, saying "'I did not murder the baby. I couldn't have.'"

Barbanica also interviewed appellant's husband at the police station that night. Smith told the detective he thought appellant was three to four months pregnant.

Dr. Brian Peterson, a forensic pathologist, performed an autopsy of the baby on the morning of April 20. The placenta was still attached to the baby's body, which weighed a little under five pounds and was about 20 inches long. The baby was full term, with a gestational age of between 34 and 40 weeks. Peterson found no evidence of decomposition and estimated the baby had died within 24 hours of 1 a.m. on April 20, the time at which the body was refrigerated in the coroner's office.

Peterson was certain the baby had been born alive and testified he had lived only a relatively brief time. He found no evidence of infection, placental abruption (a condition that can cause prenatal death), or maceration (the changes undergone by a baby that dies in the womb). He did find air in the stomach, which generally can happen only from swallowing, and pink-tinged foam in the upper airways, indicating air had been breathed, [7] and evidence of air in the lungs. He did not determine a cause of death; he did not find injuries that would invariably be fatal and did not find evidence of natural disease that would necessarily have produced death. He found some "soft signs" of death by asphyxiation, namely the pink-tinged foam in the airways, but did not find other signs of asphyxia, such as hemorrhage in the base of the skull.

Analysis of the baby's blood revealed methamphetamine at a level of 1.34 micrograms per milliliter. Peterson testified that methamphetamine taken by a pregnant woman will be transferred through the placenta to the baby at the same level. Analysis of the drug in the baby's blood indicated the mother had ingested methamphetamine recently before the birth. The level of methamphetamine found in the baby's blood was "significant" for a newborn; a level greater than 2 would

be considered lethal. Peterson felt methamphetamine was a contributing factor in the death of the baby. He testified that the amount of methamphetamine involved in this case could have stopped the baby's heart and could have killed the baby but would not necessarily have done so. Without the methamphetamine if the baby was left in the toilet, it would have died. Peterson felt a baby born with this amount of methamphetamine in his system "may well have survived" if born in a hospital or given immediate medical attention, and might have survived even without immediate medical attention. The placenta remaining attached to the baby could have hastened death by causing shock more quickly.

Defense

Appellant, age 27 at the time of trial, testified that she began using methamphetamine occasionally at age 15 and used it most weekends until she entered the military when she was 18. She started to use the drug again when she left the military in 1994. During the fall of 1994, appellant was using about a quarter of a gram of methamphetamine a day; she continued to use up to a half gram a day until her arrest.

Appellant and Smith had been having marital problems since April of 1991 which were getting worse by the fall of 1994. When appellant learned she was pregnant in [8] October 1994, she considered having an abortion, but when she had periods in November and December, she thought she had had a false pregnancy test or a miscarriage. In February 1995, appellant again thought she might be pregnant because she missed her period but did not go to a doctor because she began to bleed again in March and April. Appellant did not want another child. She had been told after the birth of her third child that it would be hard for her to get pregnant, although she had a miscarriage after being told this.

When she went to the doctor in April, she thought she had a collapsed uterus. She was not as large as she had been at eight months in her three full term pregnancies and was not wearing maternity clothes. Her reaction to being told she was pregnant was "disbelief;" she was not happy and cried. Dr. Bui told her the baby was due at the end of May. Appellant discussed with the nurse calling the adoption agency she had used before. She did not tell her husband about the pregnancy because she expected him to be "outraged."

Appellant said she did not sleep between Friday, April 14 and Sunday, April 16, and smoked methamphetamine throughout that time. She never told a medical professional that she was using drugs. She did not know methamphetamine could cause bleeding or premature labor or cause the baby to die.

Appellant did not think she was going to give birth on April 16, was not trying to cause herself to have the baby, and did not realize as she sat on the toilet that she was having contractions. When the baby was born, she heard a "gurgle" once or twice, looked and saw the baby was not moving and was blue. She did not pick him up; she "just couldn't move at that point" and stood looking at him, then closed the toilet lid because she "just couldn't look at him no more."

Appellant denied doing anything to actively kill the baby, testifying she never once thought the baby was alive and that it never occurred to her he could drown or she could save him. She wanted to call 911 but did not do so because her husband and children were around and she was afraid people would hate her if they knew what had happened. [9] She concealed the baby because she did not want anyone to know what had happened. She continued to use about a half gram of methamphetamine a day until Wednesday, when the police came, and slept only a few hours during this time. She had last smoked methamphetamine about a half hour before the police

came to the apartment. Appellant admitted she had lied to others about her drug use and the circumstances and date of the baby's birth and death. She told the nurse and doctor at Kaiser that the baby had been born on April 18 because she was scared and knew she had "disrespected" his body. She acknowledged the various statements she had made to Detective Barbanica and testified that when she told him she could not believe what she did, she was referring to putting the baby's body on the balcony.

Dr. Albert Kastl, a psychologist with expertise on substance abuse, testified that people using methamphetamine feel very capable but in fact have a poor ability to function, often displaying illogical thinking, difficulty planning behavior, paranoia, impulsiveness and inability to adhere to conventional morality. They often show inappropriate affect, displaying emotional reactions inconsistent with the situation, and have a very poor understanding of risks.

In response to a hypothetical question assuming the general circumstances of appellant's life, daily use of approximately half a gram of methamphetamine and the circumstances of appellant's baby's birth and death, Kastl opined that the woman would not be able to make sound and appropriate judgments or plan her behavior well, would be likely to act impulsively and have an impaired ability to appreciate the emotional significance of what was happening, and would be unable to cope with the additional stress of a premature, unwanted baby. He testified the act of putting the dead baby into the household garbage reflected an inability to plan or incongruity between the emotions and socially appropriate behavior and displayed many of the features associated with acute amphetamine intoxication. With use of a quarter gram of methamphetamine a week instead of a half gram a day, the person would have a "serious inability to cope with [10] reality;" a single use of methamphetamine could result in major changes in ability

to think and plan in a person not used to the drug. Kastl did not think it was "psychologically probable" a woman in appellant's situation might have taken a large dose of methamphetamine to allow her the ability to kill her unwanted child and was not aware of any instance in which this drug had been used to gain ability to commit an antisocial act, but acknowledged that such use of the drug would be possible.

Dr. Paul Hermann, a pathologist, testified that newborn babies' bodies decompose more slowly than others and believed the baby could have died as early as April 16, although it could also have died later. Hermann agreed with Peterson's conclusion that the baby was born alive. He testified that the pink-tinged foam in the baby's windpipe could have been from drowning, although it could also have been amniotic fluid taken into the lungs before or during birth. Hermann found "considerable" infection in the membranes around the baby, although not in the umbilical cord. Such infection could cause rupture of the membranes and onset of labor, or could occur if labor did not begin for some time after rupture of the membranes. There was no evidence of infection in the baby.

Hermann testified that a level of .38 micrograms per milliliter of methamphetamine in an adult women's blood was a high amount that would cause most people to show outward signs of intoxication. The level of 1.34 micrograms per milliliter in the baby's blood was an extremely high amount. Hermann doubted the levels of methamphetamine in the blood of mothers and newborns would be the same over any period of time, suspected that methamphetamine taken by a pregnant woman could accumulate in the baby over time, as is the case with many drugs, and testified the baby in the present case did not necessarily receive the level of methamphetamine shown from a single dose. A newborn could die from methamphetamine poisoning and Hermann felt it was

possible methamphetamine alone could have killed the baby in this case. At the level found in the baby, Hermann would expect the child to be very tremulous and possibly [11] have convulsions, cardiac arrhythmia and breathing irregularities. Methamphetamine poisoning could cause a baby to stop breathing.

Rebuttal

A police officer who participated in the search of appellant's apartment on April 19 testified that he found a plastic baggie containing off-white residue that appeared to be methamphetamine but did not find a pipe or other instrument indicating methamphetamine use.

Detective Leonard Orman of the Antioch Police Department, who testified as an expert on recognizing the effects of methamphetamine, did not consider a quarter to a half gram a day of methamphetamine to be a "high amount." After watching about 20 minutes of the tape of appellant's interview with Detective Barbanica, Orman was of the opinion she was not under the influence of methamphetamine because she was able to sit still for long periods of time and concentrate on one subject as she spoke with the officer did not "ramble on constantly" and waited for questions to be asked. Orman testified significant symptoms of methamphetamine use would last approximately six to seven hours. He further testified that a woman who took methamphetamine at 4:30 p.m. would possibly still be exhibiting symptoms at 12:30 a.m. and opined that appellant probably did not smoke a half gram of methamphetamine at 4:30 p.m.

DISCUSSION

Appellant contends her conviction must be reversed because the trial court erred in allowing the prosecution to introduce evidence of her statements to Detective

Barbanica. She claims these statements were elicited in violation of her rights under *Miranda* v. *Arizona* (1966) 384 U.S. 436.

The United States Supreme Court held in *Miranda* "that a person questioned bylaw enforcement officers after being 'taken into custody or otherwise deprived of his freedom of action in any significant way' must first 'be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and [12] that he has a right to the presence of an attorney, either retained or appointed.'" (*Stansbury* v. *California* (1994) 511 U.S. 318, 322.) Statements obtained in violation of this rule may not be used to establish guilt. (*Miranda* v. *Arizona*, *supra*, 384 U.S. at p. 444; *People* v. *Aguilera* (1996) 51 Cal.App.4th 1151, 1161.)

The obligation to administer *Miranda* warnings attaches "'only where there has been such a restriction on a person's freedom as to render him "in custody."'" (*Stansbury v. California, supra*, 511 U.S. at p. 322, quoting *Oregon* v. *Mathiason* (1977) 429 U.S. 492, 495.) In the present case, appellant contends she was in custody during her entire interview with Detective Barbanica. Respondent contends she was not in custody until she was actually placed under arrest. "On appeal, we accept the trial court's findings of historical fact if supported by substantial evidence but independently determine whether the interrogation was 'custodial.'" (*People* v. *Aguilera, supra*, 51 Cal.App.4th at p. 1161.)

"In determining whether an individual was in custody, a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" (*Stansbury v. California, supra*, 511 U.S. at p. 322, quoting *California* v. *Beheler* (1983) 463 U.S. 1121, 1125.) "Courts have identified a variety of relevant circumstances. Among them are whether contact with law

enforcement was initiated by the police or the person interrogated, and if by the police, whether the person voluntarily agreed to an interview; whether the express purpose of the interview was to question the person as a witness or a suspect; where the interview took place; whether police informed the person that he or she was under arrest or in custody; whether they informed the person that he or she was free to terminate the interview and leave at any time and/or whether the person's conduct indicated an awareness of such freedom; whether there were restrictions on the person's freedom of movement during the interview; how long the interrogation lasted; how many police officers participated; **[13]** whether they dominated and controlled the course of the interrogation; whether they manifested a belief that the person was culpable and they had evidence to prove it; whether the police were aggressive, confrontational, and/or accusatory; whether the police used interrogation techniques to pressure the suspect; and whether the person was arrested at the end of the interrogation. (See *People* v. *Stansbury* [(1995)] 9 Cal.4th [824, . . .] 831-832; *People* v. *Lopez* (1985) 163 Cal.App.3d 602, 608 . . .; *People* v. *Spears* (1991) 228 Cal.App.3d 1, 25 . . .; *U.S.* v. *Griffin* (8th Cir. 1990) 922 F.2d 1343, 1348.)" (*People* v. *Aguilera, supra*, 51 Cal.App.4th at p. 1162.) A police officer's subjective view that the defendant is a suspect is relevant only if it is communicated or otherwise manifested to the defendant. (*Stansbury* v. *California, supra*, 511 U.S. at p. 324.) "Where no formal arrest has taken place, the pertinent question is 'how a reasonable man in the suspect's position would have understood his situation.'" (*People* v. *Esqueda* (1993) 17 Cal.App.4th 1450, 1481, quoting *Berkemer* v. *McCarty* (1984) 468 U.S. 440.442.)

At the suppression hearing in the present case, Pittsburg police detective Michael Barbanica testified that when he arrived at appellant's apartment at 5:23 p.m., Officer Beyhan was with her in the dining area and two

other officers were also present at the scene. Barbanica told appellant he was there to investigate the death of her baby. He asked if she would be more comfortable waiting in one of the bedrooms while he retrieved the baby from the garbage bag and she went into a bedroom with Beyhan. After finding the baby, Barbanica asked appellant if she would come to the station to discuss what had happened making it "very clear" this was on a voluntary basis and appellant was not being arrested. Appellant agreed and was taken to the police station by Officer Beyhan at about 5:41 p.m. Barbanica told Beyhan appellant was not under arrest and was being driven to the police station on a voluntary basis. When Barbanica arrived at about 6:30, appellant was watching television with Officer Beyhan in the kitchen area.

[14] Barbanica walked with appellant to an interview room and they talked about searching appellant's apartment; appellant refused consent, expressing concern about whether this would be bad for her, and Barbanica told her it was not a problem and explained he was going to get a search warrant. Barbanica also told appellant he was concerned that she should see a doctor, her doctor had arranged for a visit at the Walnut Creek Kaiser, an officer would give her a ride, but the medical appointment was voluntary. Appellant said that would be fine and was taken to an open area at the back of the station where officers wrote their reports while Barbanica left to write a search warrant. The search warrant, which included taking a blood sample from appellant at Kaiser Walnut Creek, was obtained at about 10 or 11 p.m. A police officer took appellant to Kaiser, where her blood was drawn with her consent, and returned her to the police station.

Barbanica began to interview appellant shortly after midnight in a small windowless room to which she had been taken. The interview lasted about an hour and a

half. Appellant was placed under arrest more than an hour into the interview.

Appellant testified that Barbanica told her he felt she would be more comfortable going to the police station while he dealt with the baby, informing her it was a "death investigation" rather than a "criminal" one. Appellant said she wanted to call her husband but the police told her they did not want her to call and wanted her to go to the station. She was told to enter a patrol car with a police officer and did not feel she had any choice. At the police station, the officer who waited with her sent a janitor away, saying he did not want anyone else in the room. A "cadet" or "rookie" was assigned to watch her; when she wanted to go to the bathroom, the cadet waited by the door. When appellant asked to smoke a cigarette, the cadet went to ask Barbanica and told appellant Barbanica wanted her to "stay put." When Barbanica told her he was concerned that she see a doctor, appellant told him she had an appointment scheduled the next day at Kaiser in Antioch but he said he would prefer she go that night and she felt she had no choice but [15] to comply. At Kaiser, the officer who had driven appellant waited outside the room where she was being examined and appellant did not think she was free to leave. Back at the police station, when appellant was taken to the interview room, she did not think she could get up and leave. Appellant acknowledged that during the interview Barbanica told her more than once she was not under arrest and was free to leave, but nevertheless she did not think she was free to leave. She was not allowed to go anywhere without a police officer next to her, either at the station or at the hospital. Appellant was never placed in handcuffs, no one held a gun on her, she never tried to get out of a room and found it locked, and she never told a police officer she did not want to talk and wanted to go home.

The parties stipulated that civilians were not allowed to wander around the police station without an escort;

smoking was not allowed in that building; and cadets were not allowed to keep custody of prisoners.

The trial court also observed the videotape of appellant's interview, which took place in a tiny room, unfurnished except for the two chairs occupied by appellant and Barbanica, hers against the wall across from the door and his between her and the door. Detective Barbanica began the interview by reminding appellant that she was not under arrest, did not have to talk to him, was free to go, and was not being "criminally charged or investigated." As appellant nodded and indicated she understood by saying, "um-huh," Barbanica said, "Okay. I'd like to get to the bottom of this. Okay. I'd like to find out what happened. Okay. Tell me a little about yourself first. What's your name?" He told appellant to put her purse down and relax; she apologized and said she was thinking about her kids. Barbanica said, "They're okay. They're okay. Yeah. But you understand you're here on your own free will." Appellant responded, "right," and Barbanica began to ask questions about appellant's children, her husband and their employment. After a number of such questions. He asked if appellant knew why she was there, she said because when she "lost" or "had the baby she should have called 911 and talked about [16] how she felt "really bad" and "guilty" because she did not give the baby "any type of respect," and how she had not known she was pregnant until the week before. In response to Barbanica's questions, appellant said she did not want more children and had been told she could not have any, and went on to describe delivering the baby, blue and white, in the shower and then placing his body in the waste basket.

At this point, moving his chair a little closer to appellant, Barbanica said, "I want you to know something. Okay. This is a very, very serious matter. Okay. Now I want you to think about something. All right. Think about this really good. This is what I do for a living.

Okay. And obviously I do a decent job at it or they wouldn't be paying me as much as they do to do this job. The other officers that work here -- there's an officer up at your house right now collecting evidence because we did find evidence at your house. Appellant asked what evidence, Barbanica said, "Well, let me get to that," and the following colloquy ensued:

"BARBANICA: And he's very good at his job, okay?

"APPELLANT: Um-hm.

"BARBANICA: And tomorrow morning I'm going to the autopsy of the baby.

"APPELLANT: Um-hm.

"BARBANICA: And the pathologist is very good at his job.

"APPELLANT: Um-hm.

"BARBANICA: Okay. A lot of times people say things happen one way because they're scared. Okay. You may have made a mistake yesterday in the way you handled the situation but let's don't make it worse now by not being 100 percent honest. Because if you made a mistake we can deal with that. Okay. And we will. We'll deal with that. All right? But let's, let's be 100 percent honest with each other here, okay, um, and I don't think you're being 100 percent honest with me right now. Okay" And I think you know where you're not being 100 percent honest. Okay.

"APPELLANT: Um-hm. [17]

"BARBANICA: I think that, uh, you want to really tell me what happened. I know you do. I know you want to get this off your chest. Because I can tell you seem like a very good person and I know this is really sittin' on you, sittin' on your chest and you want to get it off your chest. Okay. I know you do. You don't seem like a mean person or a vindictive person at all. You seem like a decent person. Okay. Think about that. I'm gonna know exactly, exactly what happened to that baby tomorrow when I go to the autopsy. And it wasn't this. Okay? I'm

gonna know exactly. I think we need to sit back for a second and let's start talking about this over again and let's get to what really happened here. I understand you didn't want the baby and you probably didn't know what to do. Okay. Tell me what really happened yesterday." After about a six-second pause, appellant said, "Well. Oh. I'm gonna be in trouble. And the only thing that's the difference of the birth it wasn't yesterday. ' Appellant told Barbanica the birth was on Easter. The interview then continued:

"BARBANICA: And there's more that you're not telling me.

"APPELLANT: And I wasn't in the shower, I was sitting on the toilet and the baby came out, but swear to God, it didn't cry. It didn't move. I probably, I heard a little gurgle and that was it. And then when I looked down in the toilet again the baby wasn't moving.

"BARBANICA: And what'd you do?

"APPELLANT: I left it. I was looking at it for a while until I had enough courage to take it out of the toilet.

"BARBANICA: Okay.

"APPELLANT: And then I put it in the wastebasket.

"BARBANICA: Babies aren't born that way.

"APPELLANT: That's how it came out. I swear.

"BARBANICA: I know that and you know that. Because you've had kids and I've had kids. And babies aren't born that way. It doesn't happen that way. Okay? But [18] hear me? [As appellant started to say something] Stop. I'm going to know what the exact cause of death is tomorrow when I go to that autopsy. That pathologist is gonna look at that baby and do so many scientific tests on that baby, he is gonna tell me to the gnat's ass what the cause of death on the baby was. He's gonna tell me. Okay.

"APPELLANT: Okay.

"BARBANICA: All right, and I'm gonna know. But I want to know you first. I want you to tell me first. Because you know when you had those three other babies, [he snaps his finger] babies don't come out like that.

"APPELLANT: Well, that third one came out in 15 minutes.

"BARBANICA: Okay.

"APPELLANT: And I was like I said I was having pains, bad back pains, when I was cleaning up my house, and then when I started feeling --

"BARBANICA: [interrupting] Please. Wait a minute. Please stop for a minute. Let's start this like we're starting this whole interview over. Okay. Let's forget about what you had already told me. Let's forget about that. Can we start over? I'm Detective Barbanica with this police department, you're here under your own free will, we're talking about this you don't have to talk to me. Okay? Let's start over. I want to give you another opportunity to tell me the actual, the actual story. Because again we have physical evidence because our physical evidence person is up there right now taking evidence. The coroner was just up there and I'm going to the autopsy tomorrow. Keep in mind this is what I do every day. This is not the first time I've seen this, this is what I do everyday. Okay? I want you to tell me the story of what happened, I want to know the real story."

Appellant reiterated her description of delivering the baby on the toilet and Barbanica questioned her about it, eliciting from her the information that she heard a "gurgle" and saw the baby in the toilet, head first, with his feet up. He continued: [19]

"BARBANICA: I'm gonna ask you a very important question. Okay. And I want you to be honest. Because I think partially you are being honest but I want to know from you, when you left it in there, were you thinking to yourself, I can't afford another kid, just let this, let this baby pass away easily? Let it die? [pause] Be honest.

"APPELLANT: Honestly, I didn't -- I was hoping the baby was gonna die stillborn.

"BARBANICA: But obviously it wasn't. Am I correct?

"APPELLANT: I guess not. If it gurgled it must have died right after it gurgled.

"BARBANICA: Did you leave it in the toilet thinking that, uh, just let this baby die? I just, I can't afford another baby right now. We don't need another baby. Let's just let this baby die?

"APPELLANT: No. Not letting the baby die. I was hoping it was dead.

"BARBANICA: Okay. But you knew it wasn't. Am I right? If it was gurgling?

"APPELLANT: Well. it gurgled just once or twice and that was it. But --

"BARBANICA: [interrupting] Okay. But if it was gurgling obviously it was alive, am I correct?

"APPELLANT: [sighing] Yeah, I guess.

"BARBANICA: I just want to know honestly from you. I want to know where your mind was at that time. Okay. And, I'm not judging you. If that was what you were thinking. That's what you were thinking. But I want to know from you. Is that what you were thinking at the time?

"APPELLANT: Part of me was and part of me wasn't.

"BARBANICA: Is that why you left it in the toilet?

"APPELLANT: That and plus I just didn't want to see it.

"BARBANICA: Did you leave it in there to die?

APPELLANT: No. I just couldn't have the courage to get it out. I didn't leave it in there to die. **[20]**

"BARBANICA: Did part of you want it to pass away?

"APPELLANT: Yes.

"BARBANICA: And is that why it stayed there?

"APPELLANT: I don't know. Probably. I don't know. Barbanica then told appellant to relax, asked if she wanted a soda, and left her alone for approximately 12 minutes. As he got up to leave, appellant expressed concern and anxiety about the police telling her husband what had happened; when Barbanica assured her they would not tell him, she demonstrated great relief. Appellant spent most of the time Barbanica was gone crying quietly. When he returned, the conversation resumed:

BARBANICA: I want you to understand. I want to be real clear about this,though. You're not under arrest. Okay. All right. You're free to go at any time. You don't have to talk to me. I'm only sitting here, I want to get to the bottom of this thing. Okay. All right. That's the way I'm looking at it, okay? Can we still keep talking about this? [six-second pause] Because I'd like to get to the bottom of it. Wouldn't you? And get this behind you?

"APPELLANT: Yeah, but, well, what more did you want me to --

"BARBANICA: [interrupting] I'd like to go over it a couple more times. That okay? [five-second pause] Is that okay?

"APPELLANT: Yeah. Fine."

Appellant's responses did not follow immediately upon Barbanica's questions; rather, she hesitated as he continued to encourage her, with a pause of perhaps 15 seconds from the time he asked if they could keep talking until she asked what more he wanted, and another pause before she said "fine" in a resigned tone. Barbanica told her to relax, asked if she wanted more time or a tissue, offered to open her soda, and asked appellant to tell him about her children. Appellant began to speak about her daughter, telling Barbanica her children were "her life" but she did not want more and would have terminated the [21] pregnancy if she had known about it earlier.

Appellant said she could not handle another child "financially, emotionally or physically;" when she stopped, Barbanica urged her to go on, tell me some more;" appellant sighed, paused, and said, "I just can't believe I did what I did." Barbanica then questioned appellant about when she learned of the pregnancy and what she intended to do at that time, eliciting her comments that she had hoped the baby would be stillborn, did not want to go through the adoption process again and felt the baby would be better off with God than with another family. At this, the interview continued:

"BARBANICA: Is that why you did this? To let it go up with God?

"APPELLANT: [sighs and gestures]

"BARBANICA: Can I tell you something? And I'm going to be very honest with you. Okay. And keep this in mind. Okay. Again, this is what I do. Okay. I know that when the baby came out and think about this before you answer me, please. Okay. Because I know in your mind you're gonna be saying this guy knows what he's talking about, okay. I know that you weren't sitting on the toilet when the baby came out, okay. I know that. Is it possible, okay, and I want you to think about this, okay, that you helped the baby into the toilet?

"APPELLANT: *No!* I swear, that I did not do. I was sitting on the toilet. You would have saw my sheet. my bed sheet that I had on the floor, because I had to cover it up. I was sitting like this on the toilet [gestures] and I was holding my mouth [holds both hand over mouth] and I pushed down. And the water squirted. It squirted to my walls. And it squirted to that little cart thing. You probably seen a little tinge of blood on my cart."

Barbanica asked appellant how she could have heard the baby gurgle and she said she could hear the sound as she sat on the toilet. He asked her to describe the sound; she made a coughing noise; he asked, "Like it was choking?" and appellant said, "Something like that. It was

like that drowning [inaudible] gurgle noise I guess." After questions [22] about whether it sounded like the baby was taking in water, Barbanica told appellant if the baby's head was submerged in water she would not have heard any noise and that if she had jumped up as she claimed, since the placenta was still inside her, the baby would have been pulled out of the water. Appellant insisted on her story and Barbanica elicited details, including a description of the baby's mouth and nose being under the water in the toilet. During this part of the interview, appellant was standing as she tried to demonstrate what she had been doing. When Barbanica told her to go ahead and sit, she said, "I did not put it in there. I did not stick the baby in the toilet like you're thinking that I did.

Barbanica continued with questions about details of the delivery and appellant's actions immediately afterward. When appellant responded, "I don't know," to his question why she left the baby in the toilet, Barbanica said, "I don't buy the 'I don't know" answer. I really don't . . . and I'll tell you why. Because deep down inside, okay, there had to be a reason. Okay. That's your child, all right. Deep down inside there had to be a reason that you closed the lid on this toilet and walked away. Okay. Was it that you wanted this baby to live?" Appellant said she did not want the baby or whole situation to exist. After questions about appellant's husband's knowledge regarding her pregnancy, Barbanica asked if appellant ever thought she wanted to pick the baby up and not let it die; crying, she answered "no." Barbanica continued with more questions about details of what appellant did after the baby was delivered. He asked appellant if he was going to find toilet water in the baby at the autopsy, if the baby really ended up in the toilet, and if he would find appellant's fingerprints on the baby. He asked again if the baby was alive when he was delivered and if the "gurgle" sounded like the baby was choking on water. After appellant said she assumed the baby was alive and guessed he may have

been "trying to gasp for that first air when the baby comes out," Barbanica again told appellant to relax and left for about six minutes. [23]

Just before Barbanica reentered the interview room, appellant could hear voices outside the room saying something including, "walk her out." As soon as Barbanica came in, appellant asked, "I'm under arrest now?" Barbanica said "no" and asked why; she told him what she had heard. He then continued the interview:

"BARBANICA: No, you're not under arrest. You're still free to go. We don't have to talk. You're not under arrest, Okay? We just want to find out some more things. A few more things. The first thing I want to find out. What was the garbage can you placed him in? Or do you still want to keep talking? Is that okay?"

Appellant said that was "fine" and answered Barbanica's questions about the garbage can, and details including the clothes she was wearing and items that were in the bathroom. Seven minutes after he had returned to the interview room, Barbanica told appellant he hoped she would understand he had to place her under arrest. Appellant broke down, saying she wanted to go home to her children and denying she murdered the baby.

The trial court found appellant "could not reasonably have believed that she was not free to go" because Barbanica's tone during the interview was "gentle," appellant was never handcuffed, appellant was asked to go to the police station voluntarily and Barbanica made an effort to explain to the officer who transported her that she was not be treated as though in custody, Barbanica sounded "genuine" when he told appellant she was free to leave, and when she was finally placed under arrest appellant became "quite upset," suggesting "she had realized that a line had been crossed." The trial court referred to this last as a "minor" point, acknowledging that appellant's reaction may have reflected the realization that she could not go home after having previously thought she

was not free to leave during the interview but would be able to go home afterwards.

The critical question in determining whether appellant was in "custody" for purposes of *Miranda*, as we have stated, is whether a reasonable person in appellant's situation would have believed her freedom had been restrained in a manner equivalent to **[24]** formal arrest. In the present case, while appellant was told her conversations with the Barbanica were voluntary and she was free to leave, and was initially told the investigation was not a criminal one, a host of factors contribute to an overall situation that can only be characterized as custodial.

Appellant was interviewed at the police station, beginning at 12:30 a.m. While the fact the interview occurred at the station would not in itself mean appellant was in custody (*Oregon* v. *Mathiason*, *supra*, 429 U.S. at p. 495, *California* v. *Beheler, supra*, 463 U.S. 1121, 1124-1125), this is not a case in which appellant voluntarily participated in a brief interview at the station and was then allowed to go her own way. (See, *Oregon* v. *Mathiason, supra*, 429 U.S. at pp. 492, 493-494; *California* v. *Beheler, supra*, 463 U.S. at p. 1122.) From the time four police officers appeared at appellant's home at around 5 p.m. on April 19 until the interview began at 12:30 a.m., a period of some seven and a half hours, appellant was never outside the company of a police officer. She was accompanied by an officer or cadet at all times within the police station. While respondent urges this treatment was not specific to appellant but applied to any civilian inside the station, there is no reason to believe appellant knew of this procedure, nor of the fact the police department does not allow cadets to keep custody of prisoners. From her point of view. and that of a reasonable person in her situation, it would clearly have appeared she was being kept under police supervision. Indeed, even when appellant was taken to the doctor in Walnut Creek --

where her blood was drawn with her consent, but also pursuant to the terms of a search warrant -- a police officer waited outside the door of the room in which she was examined.

In *State of South Dakota* v. *Long* (8th Cir. 1972) 465 F.2d 65, the defendant was stopped by the police and his car searched, he and his companions were asked to follow the officers to the sheriff's office. where the car was again searched, a police officer accompanied the defendant to have a team photograph taken, and the defendant was then interviewed in his dormitory room, with the door closed. The court stated, "from the time [25] they were stopped in the canyon until the admissions were made later in the room, Long was continuously accompanied by or in the presence of the sheriff or one of his deputies or both. This certainly was a significant deprivation of Long's freedom of action. He could have reasonably believed that he was in custody, particularly when the sheriff insisted on a deputy accompanying him to have his picture taken." (*Id.*, at pp. 69-70.)

In *People* v. *Esqueda, supra*, 17 Cal.App.4th 1450, the defendant drove to a gas station at about 10 p.m. with his young children and his dying live-in companion in his truck. The defendant consented to a search of his apartment and his truck was searched and impounded. About 1:30 a.m., he was taken to a police station and interviewed for about 20 minutes, then transported to a different police station and interviewed for about an hour in a small room in a secured area. He was guarded while in the homicide building, had been separated from his children and had not been allowed to go to the hospital or given information about his girlfriend as requested. The court found that the defendant's having been asked for the consent, not allowed to go to the hospital, taken to the police station, asked to go to the interview room reached only by security measures, accompanied by uniformed officers to each police station and guarded while in the

homicide building "tends to show some indicia of arrest. A reasonable person could have easily presumed under such circumstances that he or she was not free to leave." (*Id.*, at p. 1482.)

In the present case, after seven and a half hours of constant police company and surveillance, it can hardly be supposed appellant felt she was genuinely free to leave at any time she wished. We are aware of no case involving a defendant kept under police supervision for more than eight and a half hours before being placed under arrest that has found the defendant was not in custody. Rather, a detention of only a little more than an hour has been characterized as a "long" one. (*People* v. *Forster* (1994) 29 Cal.App.4th 1746, 1753.) **[26]**

In addition, appellant testified she was not permitted to call her husband before going to the police station and the videotape of her interview demonstrates she expressed concern over the well being of her young children, who had been at home when she left for the police station. "[S]eparation of the suspect from family or colleagues who could offer moral support" and "isolation in nonpublic questioning rooms" are factors tending to support a finding of custody. (*U.S.* v. *Griffin* (lOth Cir. 1993) 7 F.3d 1512, 1519; see *People* v. *Esqueda, supra*, 17 Cal.App.4th at p. 1482 [defendant separated from his children and not given requested information about condition of live-in companion he was subsequently charged with murdering].) In *Griffin*, the court found the defendant was in custody where she was separated from the friend with whom she was traveling and taken, voluntarily, to a small office in the police restricted area of the airport, in which a police officer sat at his desk, positioned so that the only means of exit for the defendant was around him. Similarly, in the present case, appellant was interviewed in a tiny windowless room, barren save for the two chairs upon which she and Barbanica sat, with Barbanica positioned between appellant and the door. Appellant was clearly

subjected to a police dominated atmosphere (*U.S.* v. *Griffin, supra*, 7 F.3d at pp. 1518, quoting *Berkemer* v. *McCarty, supra*, 468 U.S. 420, 439; *Miranda* v. *Arizona, supra*, 384 U.S. at p. 445); "[w]here police are in full control of the questioning environment, custody is more easily found. (*U.S.* v. *Griffin, supra*, 7 F.3d at pp. 1518-1519.) In *Miranda,* the Supreme Court noted that the cases before it involved "incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." (384 U.S. at p. 445.) "Because the court in *Miranda* expressed concern with the coerciveness of situations in which the suspect was 'cut off from the outside world' and 'surrounded by antagonistic forces' in a 'police dominated atmosphere' and interrogated 'without relent,' circumstances relating to those kinds of concerns are also relevant to the custody issue. Thus custody is less likely to be deemed present when the questioning occurred in the presence of the suspect's friends or [27] other third parties, and more likely to be found when the police have removed the suspect from such individuals." (LaFave, Criminal Procedure (1984) § 6.6, p. 293.)

Notwithstanding Detective Barbanica's "gentle" tone and repeated statements that appellant was free to leave, the nature of the interrogation also indicates appellant was in custody. Barbanica relentlessly questioned appellant in a manner calculated to intimidate her: telling her how good he and the other officers on the case were at their jobs, assuring her they would soon know exactly what had happened, but telling her he wanted to hear it from her first. In the context of this interview at 12:30 a.m., after appellant had been in the constant company of the police for some seven and a half hours and had been precluded from calling her husband or having a cigarette, the "gentle" tone employed by Detective Barbanica can only be viewed as a sophisticated tactic designed to create the impression appellant was free to leave but at the same

time effectively induce her to remain subject to his efforts to elicit incriminating statements. In *Esqueda, supra*, 17 Cal.App.4th at p. 1482, the court noted, as one of the factors supporting a finding that the defendant was in custody, that "the forms of questions asked Esqueda by [the detective], although not specifically accusatory, were purposefully stated in a comforting manner by[the detective] because he knew he would lose Esqueda to further questioning if he asked questions in an accusatory fashion." Similarly, in *State of South Dakota* v. *Long, supra*, 465 F.2d at p. 68, the court found a custodial situation despite the sheriff having questioned the defendant in a "fatherlike" manner and "gained [his] friendship."

A reasonable person in appellant's position could have had little doubt why she was being questioned at the police station at 12:30 a.m. This is not a case in which the defendant was initially questioned as a witness to a crime and subsequently became a suspect (*People* v. *Stansbury, supra*, 9 Cal.4th at p. 828); if the baby was murdered (as opposed to having been stillborn) appellant, the only person present at the birth, was the only suspect. Suspicion understandably focussed upon appellant at the commencement of the police investigation. Early in the interview, Barbanica told appellant a search warrant [28] had been executed at her apartment and the police had found evidence -- thereby unquestionably communicating to her that she was a suspect in a murder case. Barbanica later prompted appellant to acknowledge the baby must have been alive because of the "gurgling" sound she heard and made it clear he believed the baby had been murdered. Once it was clear the detective believed the baby had been born alive, it was also clear he believed appellant had murdered the infant. Indeed, Barbanica said as much, asking appellant during the interview if she left the baby in the toilet to die and if it was"possible she had "helped the baby into the toilet." As in *Griffin, supra*,

7 F.3d at pp. 1518-1519, "[t]he questions were case specific" and "continued even after it was obvious defendant was incriminated . . . . A reasonable person under the same circumstances would believe she had no choice but to continue to answer the incriminating questions."

This conclusion is not altered by the fact that Barbanica told appellant a number of times she was being interviewed voluntarily and was free to leave. These statements were invariably coupled either with pleas to help him get to the bottom of the case or sympathetic observations aimed at allaying her anxiety. Knowing appellant was nervous and distraught (having just given birth to a child who either died before birth or immediately after), concerned about her young children, and undoubtedly exhausted at 12:30 a.m. After seven and a half hours at the police station or hospital, Barbanica repeatedly coaxed appellant to "get it off her chest" and help him learn what had happened, accused her of lying to him, and constantly asked her to repeat details of the incident. Indeed, at least after the initial statements with which he began the interview, Barbanica's admonitions that appellant was free to leave were given at times that make them appear calculated to persuade her to do just the opposite. Barbanica began the interview by telling appellant she was not under arrest, did not have to talk to him and was not being criminally investigated, and that he wanted to understand what had happened. She agreed, then very quickly expressed concern about her children. He told her the children were okay and repeated that she was there of her own free will, then [29] asked a series of neutral questions about appellant's life and family before delving into the incident under investigation. The primary function of Barbanica's statements seemed to be to calm appellant so she would talk.

Later, after telling appellant he did not believe her initial story about the baby being born in the shower,

hearing the revised description of the birth into the toilet, expressing his disbelief of this story and reminding appellant the pathologist was going to find out the cause of death, Barbanica asked appellant to "start over" and repeated the introductory portion of the interview in abbreviated form, "I'm Detective Barbanica . . . you don't have to talk to me . . . . Let's start over." This admonition was not aimed at assuring appellant understood she could terminate the interview, but was Barbanica's means of setting the stage to pretend the interview already long underway was just commencing.

After the segment of the interview in which Barbanica elicited from appellant the admission the baby must have been alive when it was born and she wanted him to be dead, he left appellant alone for approximately 12 minutes, most of which time she spent with her head in her hands or crying. Barbanica returned, repeated that appellant was free to leave and encouraged her to talk as she hesitated for about 30 seconds before saying "fine." Still later in the interview, after appellant had been left alone for some six minutes and upon hearing another officer outside the interview room say something about walking her somewhere, asked Barbanica if she was now under arrest, Barbanica assured her she was not, discussed some of the details of the incident, and did not place her under arrest and advise her of her *Miranda* rights until approximately seven minutes later. Again, Barbanica's comments about appellant being free to leave come across primarily as efforts to calm appellant and cause her to continue the interview.

Barbanica's statements at best gave a double message, on the surface informing appellant she did not have to continue the interview but at the same time, more subtly, telling her she needed to stay. In the context of the numerous factors in this case that **[30]** would induce a reasonable person to believe he or she was effectively in custody, to allow the "free to leave" admonitions to

determine a contrary conclusion would be to allow use of such admonitions to completely undermine *Miranda*. Telling a subject he or she is free to leave and does not have to talk, of course, does not inform that subject of the consequences of choosing to stay and talk to the police -- that any incriminating statements made may be used against him or her. If merely telling a person he or she is free to leave is sufficient to prove the person is not in custody, police officers could routinely make such statements in the hope of eliciting incriminating admissions without informing the person of his or her constitutional rights.

We conclude appellant was in custody, for purposes of *Miranda*, during her interview by Detective Barbanica. The trial court thus erred in denying her motion to suppress the statements made during this interview. There can be no doubt this error was prejudicial. It was only in her statements to Barbanica that appellant told the story of the baby being born into the toilet, damning herself by her admissions that she heard a gurgle (proving the baby was alive) yet left the baby with his head submerged in the toilet. We cannot assume appellant would have testified if these statements had been excluded. Without these statements, it could have been proved the baby was born alive -- both pathologists so testified -- and appellant disposed of his body in her garbage and told none for several days, but the prosecution would have had no direct evidence of what in fact happened to the baby and no evidence to contradict appellant's initial report to the nurse and doctor that she had delivered the child in the shower and believed it was dead because it was blue and unmoving. Even if a jury could have believed appellant caused the baby's death, there would have been little or no evidence from which to find the intent required to prove murder. Clearly, admission of appellant's statements to Barbanica was not harmless beyond a reasonable doubt. (*Arizona* v.

Fulminante (1991) 499 U.S. 279, 285-302, 310; *People* v. *Esqueda, supra*, 17 Cal.App.4th at p. 1487.) [31]

In view of our conclusion that appellant's conviction must be reversed, it is not necessary for us to reach appellant's additional claims of error.

The judgment is reversed.

Kline, P.J.

We concur:

Haerle, J.
Lambden, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MARIAFELISSA SMITH, Defendant and Appellant	A072044 (Contra Costa County Super. Ct. No. 9509894)

BY THE COURT:

The petition for rehearing is denied.

The written opinion filed on July 3, 1997, is modified in the following respects:

At page 30, the second full paragraph is deleted and the following inserted in its place:

"We conclude appellant was in custody, for purposes of Miranda, during her interview by Detective Barbanica. The trial court thus erred in denying her motion to suppress the statements made during this interview. There can be no doubt this error was prejudicial. Aside from appellant's own trial testimony it was only in her statements to Barbanica that appellant told the story of the baby being born into the toilet, damning herself by her admissions that she heard a gurgle (suggesting strongly the baby was alive) yet left the baby with his head submerged in the toilet. We cannot assume appellant would have so testified if these custodial [2] statements had been

excluded.[1] Without these statements, it could have been

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1. In its brief, respondent argued appellant was not in custody when she made her statement to Detective Barbanica but did not suggest that if she was found to have been in custody, the error in admitting her statement could be deemed harmless. Appellant specifically noted this absence of harmless error in its reply brief and respondent did not contest the point until after our initial opinion. In a petition for rehearing, respondent asserts for the first time the error in admitting appellant's statement is harmless because her trial testimony tells the same story as the extrajudicial statement.

Respondent's argument is based on the assumption *Oregon* v. *Elstad* (1984) 470 U.S. 298, "implicitly overruled" *Harrison* v. *United States* (1968) 392 U.S. 219. *Harrison* held that if introduction of an inadmissible confession impels a defendant to testify at trial, that testimony may not be used on retrial. Elstad held that a failure to comply with *Miranda*, "unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," does not require suppression of a subsequent extrajudicial statement given after Miranda warnings. (470 U.S. at p. 309, italics added.) Far from overruling *Harrison*, *Elstad* reaffirmed that "[i]f the prosecution has actually violated the defendant's Fifth Amendment rights by introducing an inadmissible confession at trial, compelling the defendant to testify in rebuttal, the rule announced in *Harrison* v. *United States* . . . precludes use of the testimony on retrial." (*Id.*, at pp. 316-317.)

Neither *Elstad* nor *Harrison* directly dealt with the question whether a defendant's testimony at trial may be used to find a *Miranda* violation harmless error. However, at least in the situation where the defendant's statements are not simply obtained without proper

proved the baby was born alive -- both pathologists so testified -- and appellant [3] disposed of his body in her garbage and told no one for several days, but the prosecution would have had no direct evidence of what in fact happened to the baby and no evidence to contradict appellant's initial report to the nurse and doctor that she had delivered the child in the shower and believed it was dead because it was blue and unmoving. Even if a jury could have believed appellant caused the baby's death, there would have been little or no evidence from which to

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warnings but are psychologically coerced or where the defendant is compelled to testify in response to the improperly admitted statements, both cases support the conclusion that the trial testimony may not be so used. This is consistent with the rule in California -- which has continued to be applied in cases that post-date *Elstad* -- that in evaluating whether *Miranda* error is harmless, it will not be assumed the defendant would have testified if the inadmissible statements had been suppressed. (*People* v. *Boyer* (1989) 48 Cal.3d 247, 280; *People* v. *Esqueda, supra*, 17 Cal.App.4th at p. 1487.) In support of its assertion that *Harrison* has been overruled by *Elstad*, respondent cites *Perri* v. *Director, Department of Corrections* (7th Cir. 1987) 817 F.2d 448, 450, fn. 2. In that case, the although district court had reached the conclusion respondent advances, the Court of Appeals declined to decide the issue, as it rejected the defendant's contention that his confession was unknowing and involuntary.

Given the lack of evidence of appellant's intent apart from the pretrial statements, there appears to be no reason appellant would have testified as she did except for the admission of her pretrial statements. In these circumstances, *Elstad* gives no reason for departing from the rule followed in *Boyer* and *Esqueda*.

find the intent required to prove murder. Clearly, admission of appellant's statements to Barbanica was not harmless beyond a reasonable doubt. (*Arizona* v. *Fulminante* (1991) 499 U.S. 279, 285-302, 310; *People* v. *Esqueda, supra*, 17 Cal.App.4th at p. 1487.)"

These modifications do not effect a change in the judgment.

Dated: Aug 4 1997 KLINE, P.J.